

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL W. BARNETT,	)	No. C 08-04120 JF (PR)
	)	
Petitioner,	)	ORDER GRANTING MOTION TO
	)	DISMISS
vs.	)	
	)	
MICHAEL KNOWLES, Warden,	)	
	)	
Respondent.	)	
_____	)	(Docket No. 23)

Petitioner, a state prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state conviction. Respondent filed a motion to dismiss the instant petition as second or successive under 28 U.S.C. § 2244(b). Petitioner did not file opposition although he was given an opportunity to do so. Based upon the papers submitted, the Court concludes that the instant petition is a second or successive petition. Since Petitioner has not presented an order from the Court of Appeals authorizing the Court to consider the claims in the instant petition, the Court will dismiss the petition.

///

///

## BACKGROUND

In 1998, Petitioner was convicted of infliction of corporal injury on mother of child with prior, battery with serious bodily injury, two strike priors, and two serious felony priors in Santa Clara County Superior Court. Petitioner was sentenced to a total term of 35 years to life in state prison.

Petitioner appealed his conviction. The California Court of Appeal affirmed on September 27, 2000. The California Supreme Court denied review on January 10, 2001. Petitioner sought a petition for a writ of certiorari, which was denied by the United States Supreme Court on June 11, 2001.

Petitioner first filed a federal habeas petition in this Court on August 8, 2001, see Barnett v. Knowles, C 01-20748 JF (PR), which was voluntarily dismissed at the request of petitioner on October 8, 2002, in order to exhaust unexhausted claims through the state courts.

On October 8, 2002, petitioner filed a state habeas petition in state superior court, which was denied on November 6, 2002. Petitioner exhausted this state petition through the upper courts, with the state high court denying review on October 15, 2003.<sup>1</sup>

On October 29, 2003, Petitioner returned to this Court with a motion to file an amended petition under his previous federal habeas action, C 01-20748 JF (PR), but the Court denied the motion, and ordered the amended petition be opened as a new habeas action, Barnett v. Knowles, C 04-2782 JF (PR).

The amended petition was filed on July 12, 2004. Finding the petition stated cognizable claims, the Court issued an order directing Respondent to show cause why the writ should not be granted. On April 12, 2005, Respondent filed a motion

---

<sup>1</sup> Petitioner commenced a second round of state habeas petitions on February 26, 2004, by filing a second state petition in state superior court. The state petition filed in the California Supreme Court on June 1, 2004, was pending at the time Respondent filed his motion to dismiss.

1 to dismiss the petition as untimely, which the Court granted on March 29, 2006,  
2 after careful review of the submitted papers thereon. On May 17, 2006, this Court  
3 denied petitioner's request for a certificate of appealability, and the Ninth Circuit  
4 also denied the request on July 26, 2006.

5 Petitioner filed the instant federal habeas action on August 28, 2008.

## 6 7 DISCUSSION

8 Respondent has filed a motion to dismiss the instant petition as a second and  
9 successive petition under 28 U.S.C. § 2244(b). Petitioner did not file an opposition  
10 although he was given an opportunity to do so.

11 A district court must dismiss claims presented in a second or successive  
12 habeas petition challenging the same conviction and sentence unless the claims  
13 presented in the previous petition were denied for failure to exhaust. See 28 U.S.C.  
14 § 2244(b)(1); Babbitt v. Woodford, 177 F.3d 744, 745-46 (9th Cir. 1999). Section  
15 2244 does apply when the previous petition was dismissed as barred by the statute of  
16 limitations which constitutes a disposition on the merits. McNabb v. Yates, 576  
17 F.3d 1028, 1029 (9th Cir. 2009); Murray v. Greiner, 394 F.3d 78, 81 (2d Cir. 2005).  
18 Additionally, a district court must dismiss any new claims raised in a successive  
19 petition unless the petitioner received an order from the court of appeals authorizing  
20 the district court to consider the petition. See 28 U.S.C. § 2244(b)(2).

21 Here, the instant petition challenges the same state conviction as the previous  
22 petition by raising new claims of ineffective assistance by trial and appellate counsel  
23 which were not raised in the earlier petition. Petitioner has not presented an order  
24 from the Ninth Circuit Court of Appeals authorizing this Court to consider these new  
25 claims. Furthermore, the previous petition was dismissed as untimely, which  
26 constitutes a disposition on the merits. See McNabb, 576 F.3d at 1029.  
27 Accordingly, this Court must dismiss the instant petition in its entirety as a second or  
28 successive petition pursuant to § 2244 (b)(1).

**CONCLUSION**

Respondent's motion to dismiss the petition as a second or successive petition under § 2244(b) (Docket No. 23) is GRANTED. The instant petition for writ of habeas corpus is DISMISSED.

This order terminates Docket No. 23.

IT IS SO ORDERED.

DATED: 2/22/10

  
JEREMY FOGEL  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL W BARNETT,  
Petitioner,

Case Number: CV08-04120 JF

**CERTIFICATE OF SERVICE**

v.

MICHAEL KNOWLES, Warden,  
Respondent.  
\_\_\_\_\_ /

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 2/23/10, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Michael W. Barnett P-07058  
Lancaster State Prison  
PO Box 4670  
INF #13  
Lancaster, CA 93536-4670

Dated: 2/23/10

Richard W. Wieking, Clerk